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THE NATURE OF THE LIABILITY OF SHARE-
HOLDERS OF A CORPORATION, UNDER
STATUTE IMPOSING A LIABILITY
ADDITIONAL TO THAT FOR
STOCK SUBSCRIBED.*

It is a legal principle firmly established in our law, that the members of a corporation are liable for its debts to the par value of the stock subscribed by them respectively.¹ This liability cannot be increased by the by-laws of the corporation. Only by a provision in the charter, or other legislative action, can this be done.² It will be our endeavor to discuss the nature of the liability thus increased by legislative action.

The origin of the doctrine that the stockholders are not personally liable for the debts of the corporation seems to be that the incorporators contracted those debts in a particular capacity, and could not be sued except in that capacity; *i. e.*, the contract was made with the incorporators associated together as a corporation, and suit upon the contract could only be brought against the contractors in their corporate capacity. In *Spear v. Grant*, 16 Mass. 9, (1819), seventy-five per cent of the capital of the X. bank was divided among the stockholders, twenty-five per cent being deemed sufficient to pay all the debts of the bank. Default was made by some of the directors, who subsequently became insolvent, and the fund was found insufficient to pay the debts. A., one of the creditors of X., sued B., a stockholder, in an action on the case, B. having received from the corporation a larger sum than the amount A. claimed. The court held, that the promise to support the action in this case was made not by the stockholder but by the corporation, who alone can be sued, and, therefore, A. cannot recover in this suit.

On judgment being recovered against the corporation, in

*Awarded Meredith prize.

¹*Carr v. Iglehart*, 3 Ohio St. 457 (1854).

²*Trustees of Free School v. Flint*, 13 Metc. 539 (1847).

case of municipal corporations, execution issued against it can be satisfied out of the private property of the members of the corporation. This was the rule under the common law in England until changed by statute, and is the rule at the present time in the New England States.³

In case of private trading corporations the common corporate name was not a sufficient designation of the corporators to authorize the sheriff to seize upon their private property on a judgment and execution recovered against the corporation.

But in equity these technical objections could not stand in the way of holding these corporators personally liable for the debts of the corporation. Accordingly in *Dr. Salmon v. Hamborough Co.*, 1 Chan. Cases, 294, (1671), the plaintiff having a claim against the defendant corporation, had been unable to compel its appearance to answer his demand against it in a court of law, since it had no corporate property upon which distress could be made, there being at that time a rule of law that the appearance of a corporation could be compelled only by a writ of distringas. The plaintiff, therefore, filed a bill in equity. The lower court dismissed the bill. On appeal to the House of Lords the plaintiff produced two precedents where relief was granted on such a state of facts. This decree was reversed by the House of Lords, and an order was made that if the company does not appear, the bill should be taken *pro confesso*, and if the company does appear and the claim is found to be just, an order should be made on the governor and the twenty-four members of the company, that there should be leviations or assessments made on the members until such a sum is produced as would answer the plaintiff's claim. This was subsequently done and enforced by process.

The case just considered was followed to its fullest extent in *Hume v. Winyon & Waldo Canal Co.*, 1 Carl. L. J. 217, (1828). In this case a bill in equity was filed against certain members of the defendant canal company, a corporation, to compel them to pay the complainant the balance of a debt due him on work done on the canal of the said company. One member alone defended, on the ground *inter alia* that

³ See *Horner v. Coffey*, 25 Miss. 434 (1853).

members of a corporation are never liable in their individual capacity for acts or debts of the corporation unless the act creating makes them so. The object of this corporation, as expressed in the act incorporating it, was to open canal navigation between certain bodies of water. No specific funds were assigned to this object, and as a means of supplying funds the stockholders passed a resolution that assessments be made on the individual members in proportion to the shares owned by them. It appeared that at the time the bill in this case was filed, this company was "existing nominally without any efficiency." Chancellor Desaussure, before whom the case came up, following the case *Dr. Salmon v. Hamborough Co.* (*supra*), held that the members are individually liable to the creditors of the corporation, and granted the relief prayed for. This was affirmed on appeal.

Jewett v. Thames Bank, 16 Conn. 511, (1844), is the earliest case after *Dr. Salmon v. Hamborough Co.* (*supra*), where equity did not allow a debt of the corporation to be enforced against an individual stockholder. In this case the B. bank was the holder of a note given by the X. society, a religious organization incorporated by statute. B. sued X., recovered judgment, and issued execution, attaching certain shares of stock in the Y. bank belonging to A., a member of the X. society. A. filed a bill in equity to restrain B. from further proceeding against his property. The court granted the relief prayed for, saying, that: "Neither in this country nor in England has it ever been supposed that the private property of a private voluntary corporation could be taken to satisfy the debt of the corporation unless so made by the charter. On the contrary a different doctrine has been everywhere established." But we have seen that both in this country and in England equity did enforce a debt, due from a private corporation, against the private property of its members.

From these considerations it will be seen that the present maxim that the members of a corporation are not liable individually for the debts of the corporation is a very modern rule of law, recognized to its fullest extent both at law and in equity, only in the more recent times. And evidence tends to show that originally the liability of a stockholder differed

in no respect from that of a partner for the debts of the firm; *i. e.*, the members of the corporation were liable without limit for the debts of the corporation.

When the rule of limited liability began to be applied in cases of commercial corporations, evidence tends to show that at least in America the unsatisfactory commercial result of such a rule was at once recognized, and the legislatures of those states in which business corporations were an important factor were not long in modifying this rule. The earliest corporation chartered in this country—"The Philadelphia Contributionship for Insuring Houses from Loss by Fire"—was chartered in Pennsylvania in 1768. The Bank of North America was chartered by Congress in 1778. The Massachusetts Bank in Massachusetts in 1784. The Associated Manufacturing Iron Company in New York in 1780. About one hundred companies were incorporated before 1800: insurance, turnpike, bridge, religious, educational, etc. There were several manufacturing companies in Massachusetts and a very few in the other states. No decisions on corporation law were made by the courts of America till the dawn of the present century. Before that time all the corporation law known here was derived from English cases and text-books.

When decisions began to be made in this country pertaining to these corporations and the principle of non-individual liability of stockholders of commercial corporations enunciated, we find the legislatures turning their attention to this question. Accordingly in New Hampshire an act, passed in 1806 incorporating a certain bank, provided that if the bank shall at any time divide its stock and neglect to pay any bills issued by it, the stockholders, assigns and members of the said bank shall in their private capacity be severally and jointly liable to the holders of any such bills. In Pennsylvania an act was passed in 1808 providing that if any association of individuals shall thereafter be engaged in banking, every member thereof shall be individually and personally liable for the debts of the association. Whether this act can apply to corporations or not, (see *Myers v. Irwin*, 2 S. & R. 368, 1816) an intention is manifest of avoiding non-individual liability of banking associations of any kind,

incorporated or not incorporated. In Massachusetts, where there was the largest number of manufacturing corporations, a general act as early as 1808 made the property of members of such a corporation liable to be levied on, to satisfy judgments recovered against it. In Connecticut, a charter granted in 1814 imposes a personal liability on the stockholders. In New York an act of incorporation passed in 1825 imposes a liability of common law carriers on the stockholders of a transportation corporation. Maine in 1836 passed an act like the one in Massachusetts; Vermont and Rhode Island passed various acts imposing individual liability during the first half of this century. England in 1824 made the members of a certain corporation liable in a way similar to the Massachusetts act of 1808.

These facts show, that instead of stockholders of business corporations being always free from liability for their debts until the legislature imposed an individual liability, their non-liability existed only long enough for the community to know of its existence, and to understand the disadvantage of such a rule of law.

One is impressed with the fact that in the earlier cases on the subject of the liability of stockholders of corporations under special legislative enactment, the courts in nearly all instances considered that the effect of these statutes was to make the stockholders liable as common law partners. But in process of time the courts lost sight of the historic reasons for passing these statutes, and constructed various theories as to the nature of this liability. The result was a great confusion in the law pertaining to this subject, which would not have been possible had the courts steadily adhered to the views held in the earlier cases and to the historical significance of these statutes.

A gradual change in the nature of the legislation also took place. At first this liability of the stockholders was very generally made unlimited. It was found, however, that in those states where such statutes existed the corporations could not thrive, and were driven to the states where the law was not so unfavorable to stockholders. Accordingly these statutes were modified, and the favorite mode of imposing liability became the so-called "double liability;" that is to say,

the shareholders are made liable for the debts of the corporation to the amount equal to the par value of the stock subscribed by them respectively, which has been universally interpreted to mean that, beside his clause liability to pay the par value of the stock, the shareholder shall be liable to an amount equal to that value.⁴

1. *The liability imposed by these statutes is a partnership liability.*

In *Allen v. Sewell*, 2 Wend. 327, (1829), the act incorporating the X. Steamboat Co. provided that the members of the said corporation shall be liable, in the same manner as at common law for transportation of all goods, etc., as common carriers. A. delivered a package to the agent of X., which was lost. He then brought an action on the case against some of the stockholders in X. to recover the value of the package. The court *held*, that the defendants were liable to the same extent and in the same manner as if there were no act of incorporation. It is true that A. should have joined all the members of the corporation in the suit, but this defect could be taken advantage of only by a plea in abatement.

There are other authorities (a partial list of which will be found in the note below) taking the view that this liability is a partnership liability, in one respect made more onerous by statute, in that it is generally several as well as joint.⁵ Examples of a variety of views on the subject are

⁴ *Willis v. Mabon*, 48 Minn. 140 (1892); *Root v. Sinnock*, 120 Ill. 350 (1887), *Schofield, J.*; *McDonnell v. Alabama Insurance Co.*, 85 Ala. 401 (1888). In *Maxwell's case*, L. R. 20 Eq. 585 (1875), *Malins, V. C.*, the articles of association of a certain corporation provided that if there are no corporate assets to pay certain debts of the corporation the stockholders shall contribute ratably to the shares held by them. The court held that the liability imposed here was over and above the value of the stock of each shareholder. In *Dreisbach v. Price*, 133 Pa. 560 (1890); s. c. 19 Atl. 569, the court interpreted the provisions of the act of 1873 which declares that each stockholder of the said bank shall be responsible for the debts of the corporation to double the amount of stock subscribed by him, to mean that besides his common law liability for the stock held by him, the stockholder is liable to double its par value.

⁵ *Maya v. Russ*, 3 Conn. 52 (1819); *Marcy v. Clark*, 17 Mass. 330 (1821); *Deming v. Bull*, 10 Conn. 409 (1835); *Moss v. Oakley*, 2 Hill,

not hard to find. In *Hanson v. Donkersley*, 37 Mich. 148, (1877), A. did some work for the X. corporation and accepted its note, on which, not being paid at maturity, he sued X., recovered judgment and issued execution, which was returned unsatisfied. He then brought an action against certain stockholders of X. to enforce the liability created by a statute which provided that the stockholders shall be individually liable for all labor performed for the corporation and that the creditor may enforce this liability after an execution shall have been returned unsatisfied. The court affirmed judgment against A. on the ground that this liability cannot be a primary liability but is that of a surety who was discharged by A's acceptance of the note from the corporation.⁶

265 (1842); *Bailey v. Bancker*, 3 Hill, 188 (1842); *Corning v. McCullough*, 1 N. Y. 47 (1847); *Stanley v. Stanley*, 26 Me. 191 (1846); *Conant v. Van Schaick*, 24 Barb. 87 (1857); *Coleman v. White*, 14 Wis. 700 (1862); *Erickson v. Nesmith*, 46 N. H. 371 (1866); *Thompson v. Meisser*, 108 Ill. 359 (1884); *Schalucky v. Field*, 124 Ill. 617 (1888). In *Paine v. Stewart*, 33 Conn. 516 (1866), *Butler, J.*, the court said that this liability is of the same character as that incurred by an association of individuals having no corporate existence; *ex necessitate rei* it must be enforced severally. In *Marshall v. Harris*, 55 Iowa, 182 (1880), *Adams, C. J.*, the court held that the liability of the stockholders of a corporation, under a statute, for failure to substantially comply with the requirements of the general incorporation act, is the same as if no attempt had been made to incorporate the association. In *Mokelumne Hill Canal Co. v. Woodbury*, 14 Ca. 265 (1859), *Cope, J.*, the court said: "It has been frequently decided that members of a corporation who are answerable personally for the corporate debts and liabilities stand in the same position in relation to the creditors of the corporation as if they were conducting their business as a common partnership." And in *Buchanan v. Meisser*, 105 Ill. 638 (1883), *Scholfield, J.*, the court said that by imposing such a liability "the effect of this is simply to withdraw from the stockholders the protection of the corporation and to leave them liable as partners."

⁶ In *Jackson v. Meek*, 87 Tenn. 69 (1888), *Tarver, J.*, the court held that a creditor is not prevented from recovering against a stockholder on his personal liability, by taking a note from the corporation, obtaining judgment against it or receiving a *pro rata* share on his claim out of the corporate assets. In *Hatch v. Burroughs*, 1 Woods, 439 (1870), *Woods, J.*, the court held that stockholders in a corporation whose property is, by the charter, at all times pledged to redeem the notes issued by the bank, in proportion to the stock held by them, are not sureties but principals. And in *Sonoma Val. Bank v. Hill*, 59 Ca. 107

And in *Patterson v. Wyomissing Mfg. Co.*, 40 Pa. 117, (1861), the court said that the liability of the stockholders under the act of 1853, declaring that they shall be jointly and severally liable for all the debts, etc. of the corporation in which they are stockholders, is "secondary not primary; collateral not principal; analogous to the case of guarantee, to be enforced if the regular process of the principal contract proves fruitless or if the corporation becomes insolvent."⁷ The decision of *Hanson v. Donkersley* (*supra*) is virtually if not in terms overruled by *Bank v. Warren*, 52 Mich. 557, (1884), which holds that the stockholders of the bank by the terms of the association are originally liable as co-debtors with the bank.

In *Diversey v. Smith*, 103 Ill. 378, (1882) a statute provides that the trustees and incorporators shall be severally liable for all the debts of the corporation till the whole capital stock of the company shall have been paid in, and a certificate, stating that fact, be filed and recorded. The court held that this liability was in the nature of a penalty, and so an action to enforce it did not survive against the executor of a deceased stockholder.

In *Derrickson v. Smith*, 27 N. J. L. 166, (1858), the court held that a statute of New York, which provides that the company incorporated under this act shall annually publish and record a statement of its assets and liabilities and in default of doing so all the trustees of the said corporation shall be jointly and severally liable for the debts of the company, is a penal act and so is enforceable only in the jurisdiction where the penalty is created.⁸

(1881), Thornton, J., the court decided that the possession of property of the corporation, as a pledge for its indebtedness did not prevent the pledgee from recovering against a stockholder in the corporation on his personal liability, on the ground that the stockholders were not sureties but were made principal debtors.

⁷ See also *Means' Appeal*, 85 Pa. 75 (1877), *Mercur, J.* But in *Craig's Appeal*, 92 Pa. 396 (1880), *Gordon, J.*, the court denied that the liability is that of a surety.

⁸ See also *Halsey v. McLean*, 12 Allen, 438 (1866); *First National Bank v. Brice*, 33 Md. 487 (1870); *Price v. Wilson*, 67 Barb. 9 (1873). In *Merchants' Bank v. Bliss*, 35 N. Y. 412 (1866), the court held that the Statute of Limitations applicable to the recovery of forfeitures and

In *Marshall v. Sherman*, 148 N. Y. 9, (1895), an action was brought by certain creditors of a bank organized under the laws of Kansas against a stockholder of the same, residing in New York. The statute under which the bank was organized provided that if any execution against a corporation shall have been issued and returned *nulla bona*, execution may be issued against its stockholders to the par value of their stock, or the execution creditor may proceed in an action at law to charge the stockholders with the amount of his judgment. The court held that overruling a demurrer to this action was error, on the ground that this remedy against the stockholder is a creature of statute, to be enforced only in the domicile where this liability was created.⁹

But there are several cases, subsequently decided, which take a view contrary to this case. In *Mechanics' Savings Bank v. Fidelity Ins. Co.*, 87 Fed. 113, (1898), Judge Dallas held that the same statute passed upon in *Marshall v. Sherman* (*supra*) is enforceable by an action at law in the Eastern District of Pennsylvania, and this ruling was affirmed in 97 Fed. 297, (1899). And in *Hancock National Bank v. Ellis*, 166 Mass. 414, (1896), the same statute was enforced in Massachusetts, and this ruling was approved in 51 N. E. 207, (1898), in a suit between the same parties.¹⁰

Derrickson v. Smith, above referred to, and similar cases are questionable decisions in view of *Huntington v. Attrill L. R.*, (1893), Appeals, 150, where the Privy Council held that a similar statute, passed upon in *Derrickson v. Smith*, is not a penal act within the rule of International law, which declares that penal statutes are not to be enforced outside of the jurisdiction where they are passed,—the purpose of the act being not to punish a wrong against the public justice of

penalties, *i. e.*, three years, applies to such cases; and in *Stokes v. Stickney*, 96 N. Y. 323 (1884), the court decided that an action to recover such a liability does not survive against the personal representatives of a deceased trustee.

⁹ See also *Tuttle v. National Bank*, 161 Ill. 497 (1896), and *Hancock National Bank v. Farnum*, 40 Atl. 341 (1898); s. c. 20 R. I. 466. And see *May v. Black*, 77 Wis. 101 (1890).

¹⁰ See also *Ferguson v. Sherman*, 116 Ca. 169 (1897); s. c. 47 Pac. 1023.

the state, but to provide a remedy to the person injured by the wrongful act.¹¹

In connection with *Diversey v. Smith*, above referred to, may be mentioned several cases. In *Cochran v. Wiechers*, 119 N. Y. 399, (1890), a statute provided that the stockholders of the X. corporation shall be severally liable for all debts, etc., of said corporation until the whole amount of the capital stock shall have been paid in and a certificate thereof filed and recorded. The plaintiffs in this case, judgment creditors of X., the full capital stock of which had not been paid in, sued the stockholders to enforce this liability. A., who was made one of the defendants, was served with the complaint, and subsequently died. The plaintiffs applied to the court for leave to continue the action against A.'s executor. This the lower court refused, on the ground that the cause of action was penal. The Court of Appeals held that this was error.¹²

In *Richmond v. Irons*, 121 U. S. 27, (1886), Matthews, J., A., one of the stockholders of a certain corporation, died during the pendency of a suit to enforce the statutory liability of the stockholders. This suit was revived against A.'s administrator, who contended that A.'s liability did not survive. The Court held this contention to be unsound. In *Corning v. McCullough*, 1 N. Y. 47, (1848), an action was brought to enforce the statutory liability of a stockholder of a certain corporation. The defence was that the action had not accrued within three years, and, as it is to enforce a penalty, it was barred by the statute of limitations applicable to such cases. The court held that this was not a good defence.

The law seems to be settled that a statute, which imposes an individual liability on stockholders until certain acts are done, as until certain steps of incorporation are taken, or until all the capital stock is paid in, does not create a penalty. Such a statute, it is held, continues the liability of partners until certain acts are done when and when only the rights of

¹¹ See also *Huntington v. Attrill*, 146 U. S. 657 (1892).

¹² See also *Norris v. Wrenschall*, 34 Md. 492 (1871); *Maxwell's case*, L. R. 20 Eq. 585 (1875); *Cuykendall v. Miles*, 10 Fed. 342 (1882).

limited liability, which the law grants to members of corporations, are given to these associates. [*Cochran v. Weichers* (*supra*) and the cases following.] The case of *Diversey v. Smith* (*supra*) must, therefore, be regarded as no longer tenable. We may assert further that an act which makes the trustees and shareholders of a corporation individually liable for its debts, in case the corporation neglects or refuses to perform certain duties, does not create a penalty, but imposes a partnership liability. There can be no basis of a distinction in law whether the omission, upon which the liability of the stockholders rests, took place before the corporation began to do business or after the business had been carried on.

There are some very respectable authorities which hold that this liability of the stockholder is founded upon contract.¹³ It is submitted that this liability is a contract liability only when the claim of the creditor sounds in contract, and it is begging the question to denominate this liability of the stockholder, as such, to be a contractual liability.

As a result of the discussion of the foregoing cases we can affirm that this liability is not that of a surety nor is it a secondary liability of any kind; is not a penalty, is not a pure creature of statute, a new thing in the law; and is not a contractual liability as such. We can also affirm the following proposition, that the statute which imposes an individual liability on the stockholder, over and above his liability to pay the par value of the stock subscribed by him, renders him or, as some of the courts have said, leaves him liable as a partner at common law with such limitations and such only as the statute prescribes. The theory underlying this proposition is adequate to explain the nature of these statutes; is founded on true legal principles, and has the express sanction of the

¹³ In *Branch v. Baker*, 53 Ga. 502 (1874), Warner, C. J., the court held that this liability becomes a contract between the stockholders and the state, when the former subscribe to the stock of the corporation. See *Corning v. McCullough*, 1 Comst. [N. Y.] 47 (1847); *Hawthorne v. Calef*, 2 Wall. 10 (1864); *Davis v. Weed*, 44 Conn. 569 (1877); *Aultman's Appeal*, 98 Pa. 505 (1881); *Brown v. Hitchcock*, 36 Ohio, 667 (1881); *Nimick v. Mingo Iron Co.*, 25 W. Va. 184 (1884); *Schertz v. First National Bank*, 47 Ill. App. 124 (1893); *Ferguson v. Sherman*, 116 Ca. 169 (1897); s. c. 47 Pac. 1023.

court. Should such a proposition be accepted, a firm basis for solving the problems presented in this class of cases and a uniformity of decisions upon them would be the important and obvious result.¹⁴

2. *It follows from the partnership theory that: A. The stockholders cannot enforce this liability against each other.*

In *Bailey v. Bancker*, 3 Hill, 188, (1842), Bronson, J., the charter of the X. company provided that the stockholders shall be jointly and severally liable for all demands, etc., against X., provided, however, that judgment and execution be first recovered and issued against X. and returned unsatisfied. A. and B. stockholders of X., held a note of X., payable to C. & Co., a certain firm, and endorsed by the said firm. A. and B. sued X. on this note, recovered judgment, and issued execution, which was returned *nulla bona*. They then recovered a judgment against C. & Co. on their endorse-

¹⁴ *Whitman v. National Bank of Oxford*, decided August 1, 1900, by the Supreme Court of the United States, decided since this essay was originally prepared, is a case where an action was brought against a stockholder of the X. bank, incorporated under the laws of Kansas, to enforce his individual liability under the Kansas statute. Held that this action will be enforced in the Southern District of New York, as it is not a statutory penalty, and so is enforceable out of the jurisdiction of the state creating the remedy. "It would not be doubted," the court said, speaking through Brewer, J., "that if the stockholders in this corporation had formed a partnership, the obligation of each partner to the other and to the creditors would be contractual, and determined by the common law in respect to partnerships. If Kansas had provided for partnerships with limited liability, and these parties, complying with the provisions of the statute, had formed such a partnership, it would also be true that their obligations to one another and to one of the creditors would be contractual. . . . And it is none the less so when these same stockholders organized a corporation under the law of Kansas, which prescribes the nature of the obligations which each thereby assumes to the other and to the creditors." While the court considered this liability as based on the ground of a contract between the stockholders and the corporation, still the court based its decision on the true principle which is, that there is no distinction, either in law or in fact, between the individual liability of stockholders under the statutes and the liability of partners, for the debts of the corporation and partnership, respectively.

ment, and assigned their judgment against X. to C. & Co., who brought suit in the name of A. and B. against the stockholders of X. The court held that A. and B. could not have recovered in this suit; that the stockholders, with reference to this statutory liability, must be considered as partners, and so cannot maintain suit at law against one another on this liability. Otherwise if A. and B. were allowed to recover in this case against the defendant, the latter could turn around and sue A. and B. with equal right to recover from them. This would be preposterous. The court held further that C. & Co. stand in the position of A. and B., and hence cannot recover. To the same effect is *Thayer v. Union Tool Co.*, 4 Gray, 75, (1855), where the court did not allow A., a stockholder, to issue attachment against certain other stockholders of the debtor corporation, under a judgment recovered against the corporation, the court saying that A. is not within the letter and spirit of the statute providing such remedy to creditors of the corporation.

In *Hollister v. Hollister Bank*, 2 Keyes, (N. Y.), 241, (1865), the X. bank became insolvent and assessments were made on its stockholders under the act of 1849, which provided that the stockholders shall be liable equally and ratably for the debts of the corporation. On account of the insolvency of some of the stockholders a part of the assessments were not collected. On application of the receiver for an order to distribute the amount collected among the creditors, several of the stockholders who had paid the assessments claimed that by virtue of such payments they had become creditors of X. and were entitled to be included with the other creditors in this distribution. The court held that they were debtors of the creditors of X., and cannot participate in this distribution till these creditors are paid.

B. *A stockholder cannot claim a set-off because of a debt due him from the debtor corporation.*

Where the stockholder is sued individually and the liability is not limited in amount, it is difficult to see how a set-off could be allowed because of a debt due him from the corporation. Where he is liable only to a limited extent, as, for example, to an amount equal to the par value of his

stock, it is equally difficult to see why such set-off should be permitted. The law is clear that a partner under such circumstances cannot defeat the right of a firm creditor, to recover the debt against him, by showing that he has a claim against the firm. The same rule should apply when a stockholder is sued on his statutory liability. He is a partner, liable as such for the debts of the corporation, only his liability is limited in amount by statute. The law should not allow the fund created for the benefit of the corporate creditors to be dissipated by the stockholders who are the debtors of such creditors.

In the case of *Mathez v. Neidig*, 72 N. Y. 100, (1878), where a suit was brought by a corporate creditor against a stockholder in the corporation to enforce his personal statutory liability, the court allowed a plea of set-off, of a debt due from the corporation to the defendant, to defeat the plaintiff's right to recover.¹⁵ It is submitted, under the above considerations, that this case was wrongly decided.

In the *Fidelity Insurance Co. v. Mechanics' Bank*, 97 Fed. 297, (1899), the A. bank, having recovered judgment against X., a corporation organized under the laws of Kansas, and having issued execution which was unsatisfied, then brought action against the B. company, administrator of C., one of the stockholders of X., to enforce the individual statutory liability of C. B. defended on the ground that C. at the time of his death was the holder of bonds of X. greater in value than the par value of his stock, which bonds, B. claimed, should be set off against C.'s liability in this action. The court held, reversing the court below, that B. is entitled to the set-off claimed, the court, however, emphasizing the fact that this was the interpretation given to the statute in the Kansas courts.

When a creditor's bill in equity is filed against all the corporators, making the corporation a party defendant, then as

¹⁵ See also *Musgrave v. Association*, 49 Pac. 338 (1897), where the court followed the decision of *Mathez v. Niedig*. Maham, P. J., filed a strong dissenting opinion in this case holding that on partnership principles no such set-off should be allowed. And see *Ball v. Anderson*, 196 Pa. 86 (1900). In *Buchanan v. Meisser*, 105 Ill. 638 (1883) and *Thebus v. Smiley*, 110 Ill. 316 (1884) Scholfield, J., the court decided that set-off in such a case will not be allowed.

the equities of all the parties are adjusted, the stockholder having a claim against the corporation should be allowed to prove that claim with the other creditors, but not even in such a case should he be allowed to set off his claim against his statutory liability, for then he would be permitted to get an advantage over the other corporate creditors from the mere fact that he is a stockholder, as this set-off might pay his debts in full, while the other creditors might only get a small percentage of their claims.¹⁶

Where the stockholder pays a debt of the corporation, for which the statute renders him liable, he is discharged from the liability under the statute if the amount so paid is equal to the amount of his liability,¹⁷ and it is a defence *pro tanto* where it is not equal to the amount for which he is liable.¹⁸ An interesting case is *Thompson v. Meiser*, 108 Ill. 359, (1884). In this case the X. bank, in which A. was a depositor, failed. Thereupon A. brought suit against B., a stockholder of X., holding a share of \$1,000, to enforce his statutory double liability. B. claimed to have discharged this liability. It appeared that B., C., D. and E., each holding a share of \$1,000 in the X. bank, had respectively bought deposit certificates against X. worth \$1,000 at fifteen cents on the dollar. B. then confessed judgment in favor of C., C. in favor of D., D. in favor of E., and E. of B. Then E. borrowed \$1,000, which he paid to B., B. paid it to C., C. paid it to D., and D. to E., E. returning the money to the place where he borrowed it. It, therefore, appeared on the record that the above judgments were satisfied. Did this transaction discharge B.? The court held: (1) That stockholders cannot maintain a suit on this liability against each other (in accordance with the view we have heretofore ex-

¹⁶ *Trust Co. v. Ins. Co.*, 18 N. Y. 199 (1858). In *Hillier v. Allegheny Co. Ins. Co.*, 3 Pa. 470 (1846), Gibson, C. J., a mutual insurance company brought an action against B., one of its members, to recover on a premium note. B. claimed a set-off because of a loss by fire of property insured in this company. It was admitted that the funds of the company were not sufficient to pay all the debts of the company. The court held, that set-off will not lie as B. might thus get more than the other creditors.

¹⁷ *Lane v. Harris*, 16 Ga. 217 (1854).

¹⁸ *Briggs v. Penniman*, 8 Cowen, 387 (1826).

pressed). It follows that, as B. paid to a person to whom he was not liable under the statute, he has not discharged his liability to the creditors thereby. (2) That, in an action by the creditor against the stockholder of a corporation to enforce this liability, the latter cannot set-off a debt due him from the corporation. So B. could not set-off the claim against the corporation by reason of the deposit certificate which he had bought. (3) That, to discharge one's self of this liability the stockholder must pay one hundred cents on the dollar, *bona fide*.¹⁹ It follows from these considerations that B. was not discharged, and is liable in the present suit.

C. *The statute of limitations begins to run at the same time against the stockholders as against the corporation.*

If this liability be regarded as a partnership liability and the stockholders liable co-ordinately with the corporation, the statute of limitations should begin to run at the same time against the stockholder as against the corporation.

In *Schalucky v. Field*, 124 Ill. 617, (1888), Magruder, J., a statute provided that when default shall be made in the payment of any debt or liability contracted by a certain bank, the stockholders shall be individually responsible to an amount equal to their respective stock. A., a depositor in this bank, brought an action against B., a stockholder, to enforce his liability under this statute. According to the laws of Illinois it is provided that where the cause of action sued upon is based upon written evidence of the indebtedness, the period of the statute of limitations is ten years; where the debt is not founded upon a written statement the period is five years. As A.'s cause of action in this case was based upon the written evidence of the deposit in the bank,

¹⁹ *Abbey v. Long*, 44 Kans. 688 (1890). See also *Manville v. Karst*, 16 Fed. 173 (1883), Treat, J., where the court held that after a suit is instituted, the stockholder cannot defeat the creditor's right to recover against him on his personal liability, by confessing a judgment in favor of a friend who had bought a claim against the corporation at a discount. And in *Jones v. Wiltberger*, 42 Ga. 575 (1871), it was decided that after a depositor of a bank brings an action against a stockholder of the same, on his personal liability, the defendant cannot defeat the rights of the plaintiff to recover by paying the amount for which he is liable to another depositor of the bank.

it is clear that if this action were against the bank the period of ten years would apply. In the present case B. defended on the ground that the cause of action did not accrue within five years and therefor he is not liable. The court, in deciding that the period of ten years applied against B. as well as against the bank, used the following language: "When a debt was contracted by the bank, the liability of those who were then stockholders attached, and from that moment, they became bound in the same manner and with like effect as if they had been doing business as partners, unincorporated. . . . It follows that the stockholders occupy the same relation to the creditors as the bank does, so far as the statute of limitations is concerned."

In *Davidson v. Rankin*, 34 Cal. 503, (1868), an action was brought by A., a creditor of the X. corporation, against B., the executor of C., a deceased stockholder of X., to enforce the liability of C.'s estate, created by a statute which provides that each stockholder shall be individually liable for his proportion of all the debts of the corporation, incurred while he was a stockholder. The cause of action in this case was a wrongful conversion in January, 1864, by X., of eight shares of stock belonging to A. A. brought suit against X. and recovered judgment in 1866. C. died in February, 1864, and B. gave notice to all the creditors. A statute declares that all claims against the estate of a decedent must be presented within ten months after notice is given by the personal representative of the deceased, or it is barred; provided, however, that if the claim be not yet due or is contingent, it may be presented within ten months after it becomes due or absolute. The court held that the debt accrued against C., at the same time as against X., and was in no sense a claim contingent upon inability to recover against X. It follows therefore that the present case did not come within the exception provided for in the act, and so A. was barred by not presenting his claim ten months after he had received notice from B.²⁰

The court in *Terry v. Calman*, 13 S. C. 220, (1879), took

²⁰ See also *Freeland v. McCullough*, 1 Denio, 414 (1845); *Conklin v. Furman*, 48 N. Y. 527 (1872); *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313 (1875); *Hyman v. Coleman*, 82 Ca. 650 (1890).

a different view, and held that the statute began to run from the time the bank failed.²¹ It is submitted that this is not sound unless this liability has its origin only upon a bank's failure to pay. Such is not the true interpretation of the statutes having reference to this liability. The liability of the stockholder is co-ordinate with the existence of the debt, but the statute restricts the enforcement of it till the remedies, instituted directly against the corporation, have failed.

But where the statute provides that, in case some act is done or omitted, the stockholders shall be individually liable for the debts of the corporation, it would seem that the statute, against the creditors, should begin to run when this act or omission takes place, as only then does the stockholder become liable to the creditors.²²

3. *But a transfer of the stock relieves the transferer from this liability.*

In *Middletown Bank v. Magill*, 5 Conn. 28, (1823), the charter of the X. corporation provides that the "personal property of the members of the said corporation shall at all times be liable for all debts due by the said corporation." A., a creditor of X., brings suit against B., who was a stockholder of X. at the time this debt was contracted, but before this suit was brought he had transferred his stock to a third person. The court held that B., when he ceased to be a member, ceased to be liable. The dissenting opinion by Hosmer, C. J., was to the effect that as B.'s liability is that of a partner, and those are liable who were partners at the time the debt was contracted, therefor B. should be held liable. This case presents then both views that have been taken on the

²¹ *Longley v. Little*, 26 Me. 162 (1846); *Terry v. Tubman*, 92 U. S. 156 (1875); *Terry v. Anderson*, 95 U. S. 628 (1877); *Godfrey v. Terry*, 97 U. S. 171 (1877); *Barrick v. Gifford*, 47 Ohio, 180 (1890).

²² In *Losee v. Bullard*, 79 N. Y. 404 (1880), *Rapallo, J.*, an action was brought by a creditor of a corporation against the trustee of the same to enforce his personal liability arising because of his neglect to file certain annual statements. The court held, that the Statute of Limitations began to run when the plaintiff's cause of action accrued and the failure of the trustee to file annual statements each year from that time did not prevent the running of the statute.

subject, the view which prevails being the one adopted by the majority of the court in this case.²³

On partnership principles the stockholder who was such when the debt was created should be liable, and the decision in the above case must be considered as contrary to this principle. But there are certain instances in the common law where a right or liability, instead of being attached to a certain person, is attached to one because he occupies a certain relation. Blackstone furnishes such an instance in commons appendant, which is a right of commons belonging to one by virtue of his occupation of certain land; and this right is distinct from commons in gross, which is a right of commons belonging to an individual in person. The same differentiation exists in the right of advowson. Blackstone furnishes us with another excellent example in the corporation sole, as the bishop. When A., the bishop, contracts a debt in

²³ The following cases hold that those are liable who were stockholders when the debt was contracted: *Mill Dam Foundry v. Hovey*, 21 Pick. 417 (1839); *Carver v. Braintree Mfg. Co.*, 2 Story 432 (1843); *Holyoke Bank v. Goodman Paper Mfg. Co.*, 9 Cush. 576 (1852); *Chesley v. Pierce*, 32 N. H. 388 (1855); *Larrabee v. Baldwin*, 35 Ca. 155 (1868); *Williams v. Hanna*, 40 Ind. 535 (1872); *Wheeler v. Faurot*, 37 Ohio, 26 (1881). In *Brown v. Hitchcock*, 36 Ohio, 667 (1881), the court held that the liability attaches personally to him who was a member when the debt was contracted but if he subsequently assigns his stock, the assignee impliedly undertakes to indemnify him from his liability, and when the suit is in equity, equity will so mould the decree as to charge him who is ultimately liable. The following cases adopt the majority opinion of *Middleton Bank v. Magill*: *Adderly v. Storm*, 6 Hill, 624 (1844); *Wheelock v. Kost*, 77 Ill. 296 (1875); *Keyser v. Hitz*, 133 U. S. 138 (1889); *Barrick v. Gifford*, 47 Ohio, 80 (1890); *Merrill v. Meade*, 6 Kans. App. 620 (1897); *Rosevelt v. Brown*, 1 Kern [N. Y.], 148 (1854) and *National Bank v. Case*, 99 U. S. 628 (1878), hold that the transferee is liable even though he holds the stocks as collateral security. In *Maxwell's case*, L. R. 20 Eq. 585 (1875) A. and B. held stock in a certain corporation, jointly. The court held that on the death of A. the stock survived to B. and that A.'s estate was not liable for contribution on A.'s share of the stock. *Curtis v. Harlow*, 12 Metc. 3 (1846), and *Root v. Sinnock*, 120 Ill. 350 (1887), hold that those are liable who were stockholders when the liability is sought to be enforced. *Cleveland v. Burnham*, 55 Wis. 598 (1882) and *Sayles v. Bates*, 5 Atl. 497 (1885), hold that those are liable who were stockholders when the debt was payable.

his official capacity, and subsequently he is succeeded in office by B., A. is no longer liable for the debt, but B. is liable. In the same way any right which attached to A.'s person because of his official capacity as bishop while he occupied such a relation, ceased to belong to him immediately on B.'s succeeding him, but became attached to the person of B.

Now while in partnership cases the law is settled that the partner's liability to creditors is not attached to him because of his relation to the firm, but is a personal liability which exists even after the partner severs his relation with the firm, in corporation cases the liability of a member of the corporation is attached to his relation to the association, and when this relation ceases his liability comes to an end. The court then adopted this rule, that the liability follows the relation, as well with respect to the stockholder's common law liability on his stock as with respect to his liability imposed on him by statute.²⁴

It must be understood that, in order for the transferrer to be relieved in any case, the transfer must be *bona fide*, to a man of financial standing. A transfer to a straw-man for the purpose of freeing the transferrer from this liability will not have such an effect. And in *Aultman's Appeal*, 98 Pa. 505, (1882), Sharswood, J., the court held that the transfer of stock after the insolvency of the corporation is not *bona fide*, and will not relieve the transferrer.²⁵

In *Jackson v. Meeck*, 87 Tenn. 69, (1888), the court held that when stockholders transfer their stock they are not thereby relieved from their statutory liability to employes for wages earned previous to the transfer. This decision is in accordance with the view of Hosmer, C. J., in *Middletown Bank v. Magill* (*supra*).

In *Marcy v. Clark*, 17 Mass. 330, (1821), Parker, C. J., replevin was brought by A. against B., who, as sheriff, levied

²⁴ See *Barrick v. Gifford*, 47 Ohio, 180 (1890), Minshall, C. J., where the court said that this liability attaches to every share of stock issued by the company.

²⁵ In *Mokelumne Hill Canal Co. v. Woodbury*, 14 Ca. 265 (1859), Cope, J., the court held that a stockholder cannot rid himself of his liability by selling his stock after suit was brought against his corporation. See to the same effect *Rider v. Fritchey*, 49 Ohio, 285 (1892).

on A.'s goods under an execution issued against a manufacturing company of which A. was a member. Before the levy A. sold his shares of the stock without any consideration to X., a straw-man. A statute provides for the liability of the person and estate of any member of a manufacturing corporation which shall not, within fourteen days after demand, satisfy any execution entered against it. The court rendered judgment in favor of B., holding, 1. That the sale by A. of his stock in this case was a fraud as to creditors, and ineffectual to relieve him of his statutory liability; and 2. That the legislature continued the principles of co-partnership in existence so that in a suit against the corporation all the stockholders are virtually defendants, and a judgment against the corporation makes the stockholders judgment debtors. A.'s property would, therefore, still be liable to be seized in execution on the judgment even if the sale of the stock after the judgment were *bona fide* and, therefore, a valid transfer.²⁶

Certain statutes make both the transferrer and transferee liable, and in *Harper v. Carroll*, 69 N. W. 610, Minn., (1896), the court decided that the liability of the transferrer in such a case is secondary to that of the transferee.

The law then seems to be settled that generally the transfer of stock, if *bona fide* and to a person of means, will relieve the transferrer of his individual liability. If not *bona fide* the transfer does not have the effect of relieving the transferrer. According to some cases, where the stockholder is made personally liable to the employes of the corporation, the transfer of the stock after the labor is performed does not relieve the transferrer. Where the statute makes the stockholder's property liable to be levied on under a judgment recovered against the corporation, a transfer of

²⁶ The following cases hold that under the Kansas statute, those are liable who were members of the corporation when the execution against it was returned *nulla bona*: *Van Demark v. Barons*, 52 Kans. 779 (1894); *Rhode Island Mortgage & Trust Co. v. Moulton*, 82 Fed. 979 (1897); *Brown v. Trail*, 89 Fed. 331 (1898); *Parkinson Sugar Co. v. Topeka Sugar Co.*, 54 Pac. (Kans.) 331 (1898). And in *Nixon v. Green*, 11 Exch. 550 (1856) a similar conclusion was reached in interpreting similar English statutes.

stock after the judgment against the corporation is recovered will not relieve the transferrer of his liability.²⁷

4. *No partner's equity with respect to the assets of the corporation is conferred upon the stockholder by reason of this liability.*

In *Baker v. Backus*, 32 Ill. 79, (1863), Breese, J., the X. corporation was incorporated under a statute which provided that the stockholders under certain conditions shall be individually liable for the debts of X. if half of the capital stock be not paid within one year of its organization, which was not done. A., the administrator of a stockholder in X., filed a bill in equity to have X. dissolved and to have its effects put into the hands of a receiver, alleging that the above statute put the stockholders in the position of partners; that A. wished to have the corporate property applied to pay corporate debts so as to save the estate of the intestate from its corporate liability. The court held that it had no jurisdiction; that the corporation cannot be deprived of its charter on application of one or more of the members, and that the stockholders have no such power as to compel the application of the funds of the corporation so as to exonerate themselves. The mere fact that the stockholders are liable as partners does not deprive the corporation of its rights and privileges as a corporation.

²⁷ In *Bond v. Appleton*, 8 Mass. 472 (1812) there was a statute making stockholders liable to pay bills issued by the bank in which they held stock, when the bank refuses to pay for the same. The court held that those are liable who were members of the bank at the time of such refusal. In *Windham Savings Inst. v. Sprague*, 43 Vt. 502 (1871), Ross, J., the charter incorporating a company, rendered its stockholders liable in case the provisions thereof are infringed. The court held that those are liable who were members when the infringement took place. To the same effect is *Austin v. Berlin*, 22 Pac. [Col.] 433 (1889). In *Steam Engine Co. v. Hubbard*, 101 U. S. 188 (1879), Clifford, J., a Connecticut statute provided that the president and secretary of certain corporations shall be liable if they neglect or refuse to file certain annual certificates. The court held that the president of one of these corporations is not liable for the debt created before such refusal to comply with the statute, though it remained unpaid during such noncompliance.

5. *This liability is enforceable directly by the creditors against the stockholders.*

This liability is created for the benefit of the creditors of the corporation. It is not an asset of the corporation in the same sense that the liability of the stockholder to pay for his stock, is an asset of the corporation. When the creditor enforces this latter liability he virtually enforces a right of his debtor, *i. e.*, the corporation.²⁸ Not so, however, with this liability created by statute. It can in no instance be enforced by the corporation, and its creditor does not attach this liability as a debt due to, or an asset of the corporation. The separate property of the stockholder, not the fund of the association, is by these statutes made liable to answer the demands of the corporate creditors. Hence on the insolvency of the corporation this liability does not pass to its receiver as an asset of the corporation unless so provided by statute.²⁹ And the corporation cannot assign this liability even if such assignment is for the benefit of all the creditors.³⁰ It follows from these considerations that the fact that the property of the debtor corporation is in the hands of a receiver will not prevent the creditors of the corporation from prosecuting a suit against its stockholders to enforce their personal liability under these statutes.³¹

6. *The procedure to enforce this liability is governed by the statute creating it.*

The prerequisite condition of the creditors' right to enforce this liability is (except in rare instances) fixed by statute to be, that all remedies against the corporation should first be exhausted. Accordingly, almost universally, the re-

²⁸ *Patterson v. Lynde*, 106 U. S. 519 (1882), and *Lane's Appeal*, 105 Pa. 49 (1884).

²⁹ *Dutcher v. Marine National Bank*, 12 Blatch. 435 (1875); *Farnsworth v. Wood*, 91 N. Y. 308 (1883).

³⁰ *Wright v. McCormack*, 17 Ohio St. 87 (1866).

³¹ *Sleeper v. Norris*, 59 Kans. 555 (1898); *Runner v. Dwiggins*, 147 Ind. 238 (1897); *Brown v. Trail*, 87 Fed. 641 (1898); *Dexter v. Edmonds*, 89 Fed. 467 (1898); *Fidelity Ins. Co. v. Mechanics' Bank*, 97 Fed. 297 (1899). *Cushing v. Perot*, 175 Pa. 66 (1896), holding a contrary view was overruled in *Ball v. Anderson*, 196 Pa. 86 (1900).

covery of a judgment against the corporation, the issuing of an execution and having it returned *nulla bona*, is made a condition precedent to the proceedings against the stockholder under the statute.³² In case, however, the corporation has been dissolved or is notoriously insolvent, it is unnecessary to take these preliminary steps.³³

This liability may be enforced in four different proceedings depending on the statute creating it.

1. On judgment being recovered against the corporation and execution unsatisfied, the creditor may subject the property of the stockholder to levy under the same or an alias execution.

2. Under the act of 1849 and its successors in Pennsylvania the original action must be brought against the corporation and such stockholders as the creditor desires to hold liable. When judgment is recovered execution must be issued first against the corporation, and, if unsatisfied, against those stockholders who were joined in the suit.

3. The creditor may bring a suit at law against an individual stockholder under the same condition precedent as in (1.).

4. He may file a creditor's bill in equity in behalf of himself and all other creditors of the corporation, against the corporation and all the stockholders.

In *Milroy v. Spurr Mountain Iron Co.*, 43 Mich. 231, (1880), Marston, C. J., the court held that where the statute provides two remedies, by choosing one, the creditor is barred from pursuing the other even if the judgment in the first remedy be unsatisfied. It is suggested that this ruling is not in accord with the spirit of the law in this country.

Where the statute names a remedy that remedy must be pursued to the exclusion of all other remedies.³⁴

³² In *Morrow v. Superior Court*, 64 Ca. 383 (1883), Sharpstein, J., the court held that this liability is primary, and the corporate creditor need not exhaust his remedy against the debtor corporation before proceeding against its stockholders; the statute in that case, however, did not make any provision that a judgment must first be recovered against the corporation.

³³ *Flash v. Conn*, 109 U. S. 371 (1883); *Barrick v. Gifford*, 47 Ohio, 180 (1890); *Latimer v. Bank*, 102 Iowa, 162 (1897).

³⁴ In *Fourth National Bank v. Francklyn*, 120 U. S. 747 (1887) and

7. *The property of the stockholder levied under an execution issued against the corporation.*

The cases of *Stone v. Wiggins*, 5 Metc. 316, (1842), and *Beers v. Bunker*, 6 Kans. App., 697, (1897), hold that levy on the property of the stockholder may not in any case be made until a demand and refusal from the corporation to satisfy the execution issued against it.

In *Stanley v. Stanley*, 26 Me. 191, (1846), Whitman, C. J., after a judgment had been recovered by a creditor of the X. corporation and after execution had been returned unsatisfied the sheriff levied on the goods of A., a stockholder of X., according to the provisions of a statute. A. then brought trespass against the sheriff for the seizure of the goods, and insisted that the private property of an individual cannot be rendered liable to be levied on by virtue of a judgment and an execution against a corporation where he has not been summoned individually to appear and so has no opportunity to defend. The court, rendering judgment against A., held that the effect of the statute is that the members of the corporation are to be regarded as partners, and the suit by the corporate creditor is virtually against the stockholders; that they are, therefore, bound by the judgment in such a suit, and so their property is liable in execution issued against the corporation.

In *Wilson v. Pittsburg, etc., Canal Co.*, 43 Pa. 424, (1862), Lowrie, C. J., a *scire facias sur* judgment, recovered against the X. corporation, was issued against certain stockholders of X., whose person and property were by statute liable to answer when an execution issued against the corporation is unsatisfied. An affidavit of defence was filed which set up matter that would have been a good defence in the original action. It was held that this affidavit was in-

Knower v. Haines, 31 Fed. 513 (1887), the court held that where a state statute, imposing an individual liability on stockholders, prescribes a special remedy, that remedy must be pursued in the Federal Courts to the exclusion of all other remedies. In *Bassett v. St. Alban's Hotel Co.*, 47 Vt. 313 (1875), the court held that a statute, providing that if the officers of certain corporations shall neglect to perform certain acts they shall be liable in an action founded on the statute, provides for a suit at law and a bill in equity will, therefore, not lie.

sufficient, the court saying that the only matter that the defendant could allege is to show that the defendants were not within the statute, as, for example, denying that they were stockholders. In other words, under these statutes the stockholders, as partners, are parties to the suit and so are bound by the judgment.³⁵

In *Child v. Coffin*, 17 Mass. 64, (1820), the court held that under the Massachusetts act of 1808, subjecting the property of the stockholders to be levied under an execution issued against their corporation, the goods of a stockholder who died before the commencement of the suit against the corporation cannot be levied on. This decision is in accord with the common law in reference to partnerships which is that on the death of a partner his estate is not liable for the firm's debts.³⁶

In England the law seems to be that a summons against a corporation is not enough to bind the stockholders under statutes similar to those just considered, and the court, in *Bartlett v. Pentland*, 1 Barn. & Adol. 704, (1831), ruled that the act of Parliament should have been suggested on the record so that any stockholder might have the right to defend; and in *Clawes v. Brettell*, 10 M. & W. 506, (1842), the court held that before the property of the stockholder could be subjected to an execution issued against a corporation, a *scire facias* must first be issued, so that the stockholder might have a hearing, and that any point in the act of Parliament that might be raised might be decided.³⁷

³⁵ In *Brown v. Trail*, 89 Fed. 641 (1898), Morris, J., the plaintiff recovered judgment against a corporation in Kansas and brought action against citizens of Maryland, stockholders of the same, to enforce their individual liability under the Kansas statute. The court held that the defendants can deny that they are stockholders or show some other cause why they are not liable in this action, but they could not deny the validity of the judgment. To the same effect see *Came v. Brigham*, 39 Me. 35 (1854).

³⁶ See also *Ripley v. Sampson*, 10 Pick. 371 (1830), Shaw, C. J. In *New England Commercial Bank v. Newport Steam Factory*, 6 R. I. 154 (1859), Ames, C. J., the court held that while the estate of the deceased stockholder cannot be made subject to this liability at common law this can be done by filing a bill in equity, all the living stockholders being made parties to the bill, as interested parties.

³⁷ In *Byers v. Franklin Coal Co.*, 106 Mass. 131 (1870), Morton, J.,

8. *Practice in Pennsylvania under the act of 1849 and the acts following it.*

In Pennsylvania the act of 1874 following the provision of the act of 1849 declares that in any action at law or in equity instituted by a creditor of the corporation, who is entitled within this act to enforce the individual liability of the stockholders, he may include as defendants any one or more of the stockholders of the said corporation. On judgment being recovered, execution should first be levied on the goods of the corporation in the county where its chief business is. In case no sufficient property is found in such county to satisfy this judgment, then the property of such stockholders as were joined in the above suit shall be levied on, provided that the action is brought six months after the right of the creditor accrued.

In *Hoard v. Wilcox*, 47 Pa. 51, (1864), Thompson, J., A., a creditor of the X. manufacturing corporation, brought an action of assumpsit against several stockholders of X. to enforce their individual liability under the act of 1849, having previously recovered a judgment against the corporation and levied execution, which was unsatisfied. The court held that the statute provided that the action must be brought either against the corporation or against the corporation and some of the stockholders. Therefore, this suit cannot be maintained because the corporation was not joined as a party.

In *Mansfield Iron Works v. Wilcox*, 52 Pa. 377, (1866), the record in the case, just considered, was amended in the lower court by adding "Mansfield Iron Works," to correspond with the parties. The company pleaded former recovery. A verdict was rendered for the plaintiff, the court refusing to instruct the jury that a former recovery against the company would bar a recovery in this action. *Held* that there was no error. To deny a recovery in this suit, the court said, would be a denial of justice; but, the court added,

the court held, that where the plaintiff has taken judgment against the corporation so that he could not summon the stockholders as required by statute in order to subject their property to be levied in the manner described, he may maintain a bill in equity against these stockholders.

it must be understood that hereafter a suit must in the first instance be brought against the corporation and those stockholders whom the creditor desires to hold liable. This practice, the court said, is illogical and inconvenient, but they are trying to follow the statute as nearly as possible.

In *Youghiogeny Shaft Co. v. Evans*, 72 Pa. 331, (1872), Agnew, J., an action of assumpsit was brought against a certain corporation, and A. and B., its president and secretary, as joint promissors. When the case came to the Supreme Court on error counsel on behalf of the plaintiff contended that this action was brought to hold A. and B. liable under the statute. The court held that as no such purpose appeared on the record and no point was made at the trial as to the liability of A. and B. as stockholders, this action cannot, at the present stage, be maintained on that ground.

9. *Suit at law or in equity.*

Where the statute provides the procedure, then, as has been said, that procedure must be followed to the exclusion of all others. But where the statute creating a liability does not name the procedure or where the procedure is named, but the remedy is being enforced in another jurisdiction where the procedure named in the statute is not binding,³⁸ the question arises, in what form shall the remedy be enforced. It seems that a suit at law by the individual creditor against the individual stockholder or a bill in equity by all the creditors against all the stockholders are the two possible ways of proceeding under these statutes.³⁹ Which of the two shall be chosen depends, according to the decisions, on the peculiar phraseology of the statute creating the liability.

On principle, a suit at law should be the appropriate

³⁸ See *First Nat. Bank v. Gustin Minerva Mining Co.*, 42 Minn. 327 (1890). But in *May v. Black*, 77 Wis. 101 (1890), Orion, J., the court held, that where a Michigan statute provides for an individual liability of the stockholders of certain corporations which is to be enforced by an action of assumpsit, a suit in equity will not lie in the State of Wisconsin, but assumpsit is the only appropriate remedy.

³⁹ In *Adkins v. Thornton*, 19 Ga. 325 (1856) and *Bird v. Hayden*, 1 Robert [N. Y.] 383 (1863), the court held that where the statute does not provide the form of enforcing this liability the creditor may sue either in law or in equity.

remedy unless the statute shows a contrary intention. Creditors of a partnership can maintain a suit at law against the partners, only all the partners must be joined, and a failure so to join them can be taken advantage of by a plea in abatement. As the stockholders are made severally liable by these statutes under consideration, with a very rare exception, there can be no reason why an individual creditor could not maintain a suit against an individual stockholder.

Accordingly in *Flash v. Conn*, 107 U. S. 37, (1883), Woods, J., the court held that where the statute provides that stockholders shall be individually liable to the creditors of the company to an amount equal to the stock held by them respectively, an action at law will lie by a creditor of the company against a stockholder to enforce this liability. A rule was laid down by the court, viz: that where the liability of the stockholder is in proportion to the stock held by him, each stockholder being liable only for his proportion of the debt, then, as such a proportion can be ascertained only in equity, a creditors' bill in equity is the only remedy; but if his liability is not made to depend upon the amount of the liability of the other stockholders, a suit at law is the only remedy. In accord with this decision is *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473, (1840), Nelson, C. J., where the court held that an action at law will lie to enforce the liability under the statute which provides that, for all the debts due by the corporation at the time of its dissolution, the persons then composing it shall be personally liable to the extent of their respective shares of stock.⁴⁰

It must be understood that to avoid a multiplicity of suits against each individual stockholder a creditors' bill in equity may, at the option of the creditors, be filed.⁴¹ But see *Pat-*

⁴⁰ See also *Simonson v. Spencer*, 15 Wend. 548 (1836); *Larrabee v. Baldwin*, 35 Ca. 155 (1868); *Grund v. Tucker*, 5 Kans. 70 (1869); *Windham Savings Inst. v. Sprague*, 43 Vt. 502 (1871); *Norris v. Johnson*, 34 Maryland, 485 (1871); *Thompson v. Nicolai*, 49 N. Y. Supp. 422 (1897). In *Culver v. Third National Bank*, 64 Ill. 528 (1871), the court held that an act creating such liability creates a legal right recognizable at law, and an action at law will be maintained.

⁴¹ *New York Life Insurance Co. v. Beard*, 80 Fed. 66 (1897); *McDon-*

terson v. Lane, 35 Pa. 275, (1860), Read, J., where the court held that, where the statute provides for a remedy at law, a creditor's bill will not lie.⁴²

In *Terry v. Little*, 101 U. S. 216, (1879), the court laid down the principle that if the liability created is not a liability to the creditors, but for the indebtedness of the corporation, an action at law cannot be maintained; but if the liability be created directly to the creditors, such an action must be upheld. In other words, where the statute declares that the stockholder shall be liable for the debts of the corporation, the court says, that thereby is shown an intention on the part of the legislature that a fund be created for satisfying the debts of the corporation. To this fund all the creditors, therefore, have an equal right, and so one creditor cannot get payment of the fund to the exclusion perhaps of all the other creditors, but each creditor has a right to a share of this fund according to the proportion that his debt bears to the whole indebtedness of the corporation. This proportion can be ascertained only by a creditors' bill in equity. Hence a suit at law will not lie. But where the statute declares that the stockholders shall be liable to the creditors of the corporation, an intention of the legislature is thereby shown to give each individual creditor a right to enforce this liability for his own benefit, irrespective of the other creditors, and so a suit at law will be maintained.

This principle in both its branches is perfectly well settled in the Federal courts and in many of the state courts.⁴³

nelt v. Ala. Insurance Co., 85 Ala. 401 (1888). But in *Hale v. Morrison* decided June 11, 1900, in the Federal Court for the Eastern District of Pennsylvania the court held, that a bill in equity will not lie to avoid a multiplicity of suits. In *Mfg. Company v. Bradley*, 105 U. S. 175 (1881), *Matthews, J.*, the court held that where a statute creates a liability against the stockholders unlimited, except in the amount of the debt of their corporation, and it prescribes no form of action, equity and law have concurrent jurisdiction, and a bill in equity will be maintained.

⁴² In *Kennedy v. Gibson*, 8 Wall. 498 (1869) and *Casey v. Galli*, 94 U. S. 673 (1876), the court held that where the whole liability of the stockholders is required to pay all the debts of the corporation the proceedings must be at law. See also *Hale v. Morrison* (1900) (*supra*, note 41).

⁴³ *Coleman v. White*, 14 Wis. 700 (1861); *Pollard v. Bailey*, 20 Wall.

As has been already pointed out, the suit at law must be by an individual creditor against an individual stockholder, for the sole benefit of the former. A joint suit against two or more stockholders cannot be brought under most statutes, as the liability is made several and not joint.⁴⁴

It might be added that in case a debt, so enforced, is paid by the stockholder against whom it is enforced, he is entitled to contribution from the corporation and all the other stockholders, and can enforce this right in equity. In *Erickson v. Nesmith*, 46 N. H. 371, (1866), Sargent, J., a bill was filed by the creditors of X., a corporation of the state of New Hampshire, against the stockholders of the same, to enforce their individual liability under a statute. The court used the following language:

"The rule for contribution among partners is well settled. If, after applying the assets there are still outstanding liabilities, the partners must contribute in proportion to their shares, and if, on the other hand, a surplus remains, it will be distributed among them in like proportion. . . . Applying these principles to the case before us, the decree should be entered on all the stockholders of the corporation, each stockholder paying the same proportion to the whole debt, as the amount of his stock or number of his shares bears to

520 (1874); *Fidelity Insurance Co. v. Mechanics National Bank*, 97 Fed. 297 (1899). In *Harper v. Union Mfg. Co.*, 100 Ill. 225 (1881), Dickey, J., the court held that under the statute making the stockholders liable for all debts entered into by the corporation prior to the payment of all the stock subscribed, the proper remedy is in equity, as "to the creditors" means "to all the creditors." In *Harris v. Dorchester*, 23 Pick. 112 (1839), Morton, J., the court held that under a statute imposing a personal liability upon stockholders of a bank in case of any deficiency arising through the mismanagement of its officers, suit must be in equity. In *Wright v. McCormack*, 17 Ohio St. 87 (1866), White, J., it was held that under a statute imposing a liability on the stockholders of a corporation "for the purpose of securing the creditors of such company" a bill in equity is the only remedy.

"*Terry v. Little*, 101 U. S. 216 (1879). In *Wright v. McCormack*, 17 Ohio St. 87 (1866), White, J., the court held that when a bill in equity against the stockholders of a corporation had been instituted by a part of the creditors for the benefit of all the creditors, no creditor can thereafter maintain a suit at law against all the stockholders or any of them, to enforce this liability for his own benefit.

the whole amount of stock or number of shares in the corporation, subject to the qualification on account of non-resident and insolvent stockholders."⁴⁵

Where the statute itself provides for a method of enforcing contribution, however, that method must be pursued. In Pennsylvania, the statute provides that in case a debt is recovered by a creditor against a stockholder, the judgment which the creditor had recovered against the corporation as a condition precedent to his pursuing his remedy against the stockholder should be assigned to such stockholder who is to enforce it, first against the corporation, and then ratably against the other stockholders. The court in *Brinham v. Wellersburg Coal Co.*, 47 Pa. 43, (1864), Agnew, J., held that a bill in equity will not lie for contribution, as there is an adequate and complete remedy provided by statute. And in *O'Reilly v. Bard*, 105 Pa. 569, (1884), Clark, J., the court held that assumpsit will not lie to enforce this contribution, as the statute provided a remedy, and that remedy excludes all others.

Where the action is in equity it must be brought by all the creditors or by less, in behalf of all.⁴⁶ The debtor corporation is made a party defendant;⁴⁷ so also are all the stockholders, or some adequate reason must be shown why all the stockholders were not joined, as that they are out of the jurisdiction or are insolvent.⁴⁸ A pro rata contribution from all the stockholders in proportion to their stock, sufficient to satisfy all the creditors who are entitled to the benefit of the statute, is decreed, provided, of course, that such a con-

⁴⁵ In *Andrews v. Callender*, 13 Pick. 484 (1833), the court held that members of a corporation *voluntarily* paying a debt of the corporation for which they are made liable by these statutes without any order of court, have no right of contribution from the other stockholders. In *Sayles v. Brown*, 40 Fed. 8 (1889), Morris, J., certain stockholders of a Rhode Island corporation having been compelled, by order of court, to pay the debts of the corporation, filed a bill against other stockholders of the same, residing in Maryland, for contribution. The court held, that because the statute was penal and so was not enforceable in Maryland, contributions will not lie.

⁴⁶ *Crease v. Babcock*, 10 Metc. 525 (1846).

⁴⁷ *Booth v. Dear*, 96 Wis. 516 (1897).

⁴⁸ *Erickson v. Nesmith*, 46 N. H., 371 (1866).

tribution does not exceed the limit of the stockholders' liability. This fund is to be shared ratably by all the creditors who have brought themselves within the provisions of the statute.

In conclusion we desire to repeat that the liability under the statutes considered in this treatise is a partnership liability, and is governed by partnership principles, except where the statute provides otherwise. It results from this principle that the stockholders cannot maintain an action against each other to enforce this liability. Also a set-off should not be allowed when a stockholder is sued individually under these statutes, no more than, when a partner is sued by a creditor of the partnership, he could set-off a debt due him from the partnership. The statute of limitations should begin to run against the stockholder at the same time as against the corporation. This liability is created for the benefit of the creditors of the corporation, and they alone can enforce it, so that the appointment of a receiver of the debtor corporation will not bar a suit by a creditor against the stockholder on this liability. The law seems to be settled that a *bona fide* transfer of his stock in the corporation will relieve the transferor from this liability as stockholder of that corporation, and that the corporation loses none of its rights and privileges as a corporation, from the mere fact that its members are made liable as partners.

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